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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 472

EASTERN MASSACHUSETTS STREET RAILWAY COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CHARLES W. MULCAHY
200 Berkeley Street
Boston, Massachusetts
Attorney for Petitioner.

J. JOSEPH MALONEY, JR.
MAGUIRE & ROCHE
HENRY L. MASON, JR.
HENRY V. ATHERTON, JR.
HERRICK, SMITH, DONALD, FARLEY & KETCHUM
Of Counsel

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v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Eastern Massachusetts Street Railway Company prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit, affirming two decisions of the National Labor Relations Board, in the instant case.

Opinions Below

There are two decisions and orders of the National Labor Relations Board involved in the instant case. They are reported at 110 NLRB 1963 and 113 NLRB 298. The two cases therein decided by the National Labor Relations

Board were consolidated in the Court of Appeals for the First Circuit. The opinion of the Court of Appeals is not yet reported, but a copy is reprinted herein, Appendix A, page 14, *infra*.

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on July 31, 1956. The jurisdiction of this Court is invoked under 28 USC, Section 1254.

Questions Presented

1. Can the respondent in an unfair labor practice proceeding before the National Labor Relations Board be denied an opportunity to prove that much of the material filed by the charging Union pursuant to Sections 9(f)(A)(2) and (6) and 9(f)(B)(1) and (2) of the National Labor Relations Act as amended [29 U.S.C. Secs. 159(f)(A)(2) and (6) and 159(f)(B)(1) and (2)] on which material the General Counsel based his administrative determination of compliance, was false (and known to be false) to such an extent as to amount to a nullity in terms of complying with the Act?

2. Where the National Labor Relations Board found that certain employees were indefinitely suspended for just cause, but that their suspensions would have been reduced to ten days had they been permitted to process grievances through the Union which the Board found entitled to represent them, did the Board have power to order them reinstated with pay back to a date ten days after their suspensions, in spite of the provision of Section 10(c) of the Act to the effect that ". . . No order of the Board shall require the reinstatement of any individual as an employee

who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .'' and if the Board did have power to enter such an order, is there sufficient evidence in the Record to warrant the finding upon which it is based?

3. Was petitioner deprived of due process when a general continuance, granted, over objection of counsel for petitioner, by the Trial Examiner on the second day of hearing of a case involving suspension of employee MacLean, lasted for a period of sixteen months, during which time an important witness for the petitioner became unavailable?

Statutes Involved

Section 9 of the National Labor Relations Act as amended (29 U.S.C., Secs. 151 et seq.) provides in part as follows:

* * *

> (f) . . . no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit
>
> (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and by laws and a report, in such form as the Secretary may prescribe, showing—
>
> * * *
>
> (2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

* * *

(6) a detailed statement of, or reference to provisions of its constitution and by laws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

* * *

Section 10(c) of said Act provides in part as follows:

"... No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause ..."

Sections 9 and 10 of said Act are reprinted in full, Appendix B, p. 30, *infra*.

Jurisdiction Below

There is no question herein as to the jurisdiction of the Court of Appeals, which jurisdiction is conferred by Section 10(e) of said National Labor Relations Act as amended.

Concise Statement of the Case

On January 30, 1953 unfair labor practice charges were filed against Eastern Massachusetts Street Railway Company, hereinafter called the "Company," by the General Conference Committee of Boston, a labor organization made up of the President of each of eleven Locals of the Amalgamated Street, Electric Railway, and Motor Coach Employees of America, into which eleven locals the Company's employees in each of its eleven operating divisions are organized. The Board's General Counsel issued a complaint pursuant to these charges alleging that the Company had failed and refused to bargain with the General Conference Committee which the Board contended was the appropriate bargaining agent for a system-wide unit of the Company's employees. In addition the complaint alleged that the Company had either indefinitely suspended or discharged certain employees in violation of Section 8(a)(3) of the National Labor Relations Act as amended.

The Company in its answer contended that the employees in each of its eleven operating divisions constituted an appropriate bargaining unit and further pleaded that the General Conference Committee had not properly complied with the filing requirements of Sections 9(f), (g) and (h) of the Act as amended and that, therefore, the Board did not have jurisdiction to issue a complaint. The Company also contended that the individual employees who had been suspended or discharged had been disciplined not in viola-

tion of Section 8(a)(3) of the Act but for just cause, namely, the violation of various Company rules.

At the hearing on this complaint, the Company offered to prove such noncompliance. At the time the offer of proof was made, the Company had the Secretary-Treasurer of the General Conference Committee on the stand as a witness in response to a *subpoena duces tecum* which ordered him to bring with him copies of all the various documents filed on behalf of the General Conference Committee in compliance with Sections 9(f), (g), and (h) of the Act, as well as the books and records of the General Conference Committee. The offer of proof was rejected by the Examiner and the Board sustained this ruling. In its brief to the Court of Appeals, Counsel for the Company stated that he was "prepared to prove that much of the material filed by the GCC pursuant to Sections 9(f)(A)(2) and (6), and 9(f)(B)(1) and (2), on which material the General Counsel based his administrative determination of compliance, was false to such an extent as to amount to a nullity in terms of complying with the Act and known to be so false by the officers of the GCC when it was filed."

In its Opinion, the Court of Appeals, after consideration of this question, said:

> "It follows that while we think the trial examiner and the Board erred in rejecting the Respondent's broad offer of proof under which it might have shown failure by the GCC or its officers to file the documents required, the error later proved harmless in the light of the Respondent's assertion that what it actually wanted to prove was not any failure to file but the falsity of some of the documents submitted for filing."

As a result of the hearing, the Board found that the Company was in violation of the Act by failing to bargain

collectively with the General Conference Committee but found that four men whom the Company had either discharged or indefinitely suspended for various causes were disciplined, not for their Union activities as the General Counsel had asserted, but rather for just cause as the Company had asserted. The Board found, however, that because of the Company's contention with respect to the appropriate unit these men had not been allowed to process grievances by the Union of their choice and that if they had been allowed by the Company properly to process such grievances their discipline would have been reduced as a result of the grievance procedure to suspensions of ten days in each case. The Company believes that there is no substantial evidence in the record to support this finding of the Board.

In a subsequent proceeding the Board found that a fifth man had been discharged for cause and that his discharge was not discriminatorily motivated, but that he, too, would have had his discharge changed to a ten day suspension if his grievance had been properly processed. The company submits that there is no substantial evidence to support this finding of the Board.[1]

The hearing in the second case before the Board, involving the fifth man referred to above and one other man, commenced on October 8, 1953. On October 9th, after a day and a half of hearing, the Examiner continued the hearing for the reason that the Board's decision and order had not yet been handed down in the first case. This continuance was granted at the request of and for the convenience of counsel for the General Counsel and over the

[1] The cases of the four men referred to above are reported in 110 NLRB 1963 (Docket No. 5030 in the Court of Appeals). The case of the fifth man referred to above is reported in 113 NLRB 298. (Docket No. 5089 in the Court of Appeals).

The two cases involve identical or closely related questions and this Petition covers both cases.

expressed objections of counsel for the Company. The hearing was not resumed until sixteen months later on February 9, 1955, and in the interval a key witness for the Company who had been available and prepared to testify in October 1953 became unavailable as a witness.

Argument

I.

The ruling of the Court of Appeals on Petitioner's offer to prove that the charging union was not in compliance with Section 9(f) of the Act raises an important question of Federal law which has not been, but should be settled by this Court. This ruling is in conflict with a decision of the United States Court of Appeals for the Sixth Circuit which is now pending for review before this Court.

Before the Trial Examiner, the Petitioner (Respondent below) made a broad offer to prove noncompliance by the charging union with Sections 9(f), (g) and (h) of the Act, but this evidence was excluded by the Trial Examiner on the ground that compliance by the Union with the Act was a matter for administrative determination, which was not litigable in these proceedings.

The Court of Appeals for the First Circuit, following the decision of this Court in *NLRB* v. *Coca-Cola Bottling Company of Louisville*, 350 U.S. 264, and its own decision in *NLRB* v. *Puerto Rico Food Products Corp.*, 232 F.(2) 515, held that the Trial Examiner was wrong in rejecting the Petitioner's offer of proof and that the Board was wrong in affirming the Trial Examiner's ruling. It held that the error was harmless, however, because counsel for Petitioner, in his brief before the Court of Appeals said that he "was prepared to prove that much of the material filed by the GCC pursuant to Sections 9(f)(A)(2) and (6), and 9(f)(B)(1) and (2), on which material the General

Counsel based his administrative determination of compliance, was false to such an extent as to amount to a nullity in terms of complying with the Act and known to be so false by the officers of the GCC when it was filed."

The Court of Appeals held that the only penalty for filing false material under Section 9(f) is the heavy criminal penalty imposed by Title 18 U.S.C. Sec. 1001 and that a respondent in proceedings of this sort cannot introduce evidence of the falsity of any of the reports or affidavits on file. It entered a decree enforcing the Board's order.

The Court of Appeals for the First Circuit thus in effect ruled that a respondent in an unfair practice case may call upon the Board to show that some pieces of paper purporting to be the various documents listed in Section 9(f), (g) and (h) have been filed, but that such respondent may not show, for example, that a document purporting to contain a detailed statement of, or reference to, various provisions of the Union's constitution and by-laws, as required by Section 9(f)(A)(6), was in fact a copy of some daily newspaper, or a document falling so far short of compliance with the requirements of the Act as to amount to a nullity.

This question was specifically left open by this Court in its opinion in the *Coca-Cola Bottling Company* case and in its opinion in the earlier case of *NLRB* v. *Highland Park Manufacturing Company*, 341 U.S. 322.[2] The importance

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[2] In its opinion in the Coca-Cola Bottling Company case, this Court said in part—350 U.S. at Pages 267-268:

> "The Board distinguishes *Highland Park* by suggesting that here the 'employer seeks to question only the *fact* of compliance, as distinguished from the *necessity* of compliance.' The genesis of this distinction comes from the following in *Highland Park*: 'If there were dispute as to whether the C.I.O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented.' 341 U.S. 322, 325. The Board misconceives the sig-

of the question raised in the administration of the Act is apparent because until this Court has spoken authoritatively, it is clear that respondents in cases before the Board will continue to raise this or similar questions and carry them to the courts for determination.

This Court has already granted certiorari in a similar case involving Section 9(h) of the Act, *Amalgamated Meat Cutters & Butchers Workmen of North America* v. *NLRB*, No. 40 on the docket of this Court for the coming term, reported below as *NLRB* v. *Lannom Manufacturing Co.*, 226 F.(2) 194. In this case, an officer of the charging union filed non-Communist affidavits pursuant to Section 9(h) of the Act annually, beginning in August, 1950. The Union filed an unfair practice charge in 1952. The Union officer was subsequently convicted of perjury in connection with his 1950 affidavit, but not in connection with his 1951 affidavit. The Court of Appeals for the Sixth Circuit held that on the record before it there was no factual issue about the 1950 affidavit, nothing to show that the Union officer had subsequently changed his beliefs, that a false affidavit

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nificance of the passage. Both *Highland Park* and this case involve the scope of § 9(h), the meaning to be derived from its language; neither case involves an inquiry into disputed facts, the situation referred to in *Highland Park*. Acceptance of a differentiation between these cases upon any such theory as that suggested by the Board would make of law too thin a dialectic enterprise.

"But if the Board's distinction is overly subtle, its reason for attempting a distinction has force, namely, a concern with 'the need to expedite the hearing of cases and the resolution of issues on their merits . . . ' 108 N.L.R.B. 490, 491. Much may be said for the claim that an employer should not be permitted to disrupt or delay complaint or representation cases by raising questions respecting § 9(h). But after *Highland Park* the argument comes too late.

"In any event, whether the impediment to the effectiveness of the administrative process in determining the merits of a charge of unfair labor practice may be serious or negligible by injecting into it the subsidiary issue of compliance with § 9(h), depends upon the scope of the inquiry opened up by the latter issue."

was in effect no compliance at all, and that the Board's jurisdiction was not shown. In the present case, there is nothing in the Record to show whether or not there was any real dispute as to the falsity or inadequacy of the documents filed by the charging union. At the time of the offer of proof, the Union's Secretary-Treasurer was on the stand and had with him the various documents filed by the Union for the purpose of compliance with Sections 9(f), (g) and (h), as well as the Union's books and records. It is entirely possible that inspection of the Union's books and records would have made the falsity or inadequacy of the documents abundantly clear and that there would have been no real question of fact. The Petitioner was not permitted to go into the matter at all.

Although the *Lannom* case involves Section 9(h) of the Act and the present case arises under Section 9(f), it is impossible, we submit, to reconcile that decision with the decision in the present case on any reasonable basis. Thus, in substance, the present case presents a situation where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter, and we urge that this is an additional reason why a review on writ of certiorari should be granted in the present case.

We submit that the present case raises as to Section 9(f) the same type of problem as is raised by the *Lannom* case in connection with Section 9(h), that the questions are not identical, since, as pointed out by the Court of Appeals, Section 9(h) itself contains reference to criminal penalties, whereas 9(f) and (g) do not, and the situation is one where the present case might well be argued and determined by this Court at the same time as the *Lannom* case.

As a further indication of the importance of this question in the administration of the Act, we call attention to the fact that there are presently pending on the docket

of this Court a number of other cases involving the filing requirements of Section 9 of the Act.

See:

Leedow v. *Mine, Mill & Smelter Workers,* cert. gr. 5/28/56 U.S. No. 57
Precision Scientific Co. v. *Mine, Mill & Smelter Workers,* No. 76
News Printing Co., Inc. v. *NLRB,* No. 91
Gold v. *United States,* No. 137
United Electrical, Radio & Machine Workers v. *Goodman Mfg. Co.,* No. 233

II.

The second question set forth above is an important question of Federal law which has not been decided by this Court, so far as Petitioner herein has been able to determine. No case has been found sustaining the authority of the Board to order the reinstatement with back pay of an employee whom the Board had found to have been disciplined for cause and not in violation of Section 8(a)(3) of the Act. No case has been found interpreting the prohibitory sentence of Section 10(c) of the Act, the plain and unambiguous language of which is quoted above, as permitting the Board to supplant management and substitute its own judgment for that of an employer in deciding the appropriate punishment for offenses found by the Board itself to have been committed and to warrant discipline.

If ultimately the Board's order is enforced, the Company will be required to bargain with the General Conference Committee, and at that time the question of whether or not the original discipline given these men, which it is conceded was for just cause, was excessive can be determined

by collective bargaining processes including arbitration, and there is no warrant in the statutes or otherwise for the Board to intervene at this time. Furthermore, there is no evidence whatsoever to support the Board in picking ten days as the proper length of suspension for five widely varied offenses.

III.

As set forth above, the Examiner in the case reported at 113 NLRB 298, after a day and a half of hearing, continued the hearing generally on motion of the General Counsel and for his convenience, and over the objection of the Company, pending the decision of the Board in the earlier case. The continuance lasted for a period of sixteen months during which time an important witness for the Company who was available to testify when the hearing commenced became unavailable. This is clearly lack of due process and should be reviewed by this Court.

Respectfully submitted,

CHARLES W. MULCAHY
200 Berkeley Street
Boston, Massachusetts
Attorney for Petitioner.

J. JOSEPH MALONEY, JR.
MAGUIRE & ROCHE
HENRY L. MASON, JR.
HENRY V. ATHERTON, JR.
HERRICK, SMITH, DONALD, FARLEY & KETCHUM
Of Counsel

Appendix A.

United States Court of Appeals
For the First Circuit

No. 5030.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

EASTERN MASSACHUSETTS STREET RAILWAY COMPANY,

RESPONDENT.

No. 5089.

SAME,

v.

SAME.

PETITIONS FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Fannie M. Boyls, Attorney, with whom *Theophil C. Kammholz*, General Counsel, *David P. Findling*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Maurice Alexandre*, Attorney, were on brief, for petitioner.

J. Joseph Maloney, Jr., for respondent.

OPINION OF THE COURT.

July 31, 1956.

WOODBURY, *Circuit Judge*. Both of these petitions for enforcement of orders of the National Labor Relations Board rest basically upon the propriety of a finding made by the Board under § 9(b) of the Labor Management Rela-

tions Act, 1947, 61 Stat. 143, 29 U.S.C. § 159(b) that only a company-wide unit of the Respondent's operating and maintenance employees was appropriate for the purpose of collective bargaining between the Respondent and those employees. The petitions also present questions of compliance with § 9(f) of the Act by one of the labor organizations involved, questions with respect to alleged discriminatory discharges of several employees, questions of union domination and support, questions of refusal to bargain, and a question of procedure.

The Respondent in previous incarnations owned and operated an electric street and inter-urban railway system regularly serving the eastern Massachusetts area and a few communities in Rhode Island. It now and for many years past has served the same area with motor buses. The gasoline it uses is purchased locally but is transported to Massachusetts from points outside the Commonwealth, it leases tires shipped to it from Ohio, and it purchases buses manufactured outside Massachusetts. The population of the area it serves is over 1,500,000 and its gross annual revenues for the years involved was far in excess of $6,000,000. The facts essential to the Board's basic jurisdiction in the premises are clearly established. Indeed, the Respondent does not contend that its activities do not subject it to the jurisdiction of the Board.

The Respondent maintains its central office in Boston where it employs about 25 persons including its principal officers. Following the pattern established by its predecessors the Respondent is divided into 11 operating divisions, each centered in a major city in the area and each under the supervision of a manager who has wide discretion and authority in the operation and control of his division. Although the Respondent operates some lines connecting two divisions, most of its business is not done between divisions but within divisions.

The employees in each division are organized into locals of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL. They have been similarly organized for many years and ever since 1906 the Respondent and its predecessor companies have had agreements with the separate locals. Since 1910 the local unions have been represented in bargaining with the Respondent by a committee called at first the Joint Conference Board and in later years the General Conference Committee (GCC hereinafter) consisting of the presidents of the 11 locals and sometimes a representative of the maintenance employees.[1] The Board, or Committee, has always negotiated single agreements covering all employees in the system but it has never been a party to a collective bargain agreement. Amalgamated was a party to the agreements until 1947, but since then the only contracting parties have been the Respondent and the eleven local unions.

Late in 1951 the GCC requested changes in the contract for the ensuing year and the parties began negotiations with respect to those changes. Many bargaining sessions were held, but in spite of efforts on both sides the parties reached an impasse over requests by GCC for changes in the existing pension plan. In this situation of stalemate, Amalgamated polled its membership throughout the Respondent's system and the employees voted almost unanimously to strike. The strike began on March 10, 1952, but nevertheless the Respondent and the GCC continued to bargain for the next three months.

On June 21, 1952, Amalgamated's local in the Respondent's Lowell Division, No. 280, voted to abandon the strike and on the following day all but 19 of its members returned

[1] Such representation is in accordance with Amalgamated's constitution which provides that contracts or agreements shall be negotiated jointly when its members are employed by the same employer but belong to different locals.

to work. Two days later the GCC notified the Lowell Local, as we shall refer to it hereinafter, that it would ask Amalgamated to revoke that local's charter and on the next day the GCC did so. The Lowell Local's executive board thereupon voted to enter into a contract of its own with the Respondent and on June 25 its representatives met with officers of the Respondent and advised them of the Lowell Local's desire for a separate contract. The Respondent immediately drafted a contract with the Lowell Local containing the same provisions as its 1950 contract with all the locals, except for a wage increase of $.15 an hour. That contract was signed before the meeting broke up. Two days later, on June 27, the Respondent wrote letters to the 19 members of the Lowell Local who had not returned to work with the others informing them that they were "suspended indefinitely," a euphemism for "fired" frequently employed by the Respondent in its dealings with its employees.

On July 8 a majority of the employees in all eleven divisions voted to end the strike provided the Respondent reinstated the 19 "suspended" Lowell strikers, and after some hesitation the Respondent, contending that reinstatement of those men was a matter to be settled only with the Lowell Local, agreed on July 13 to do so. On July 15 the strike ended and all the strikers returned to work.

In the meantime on June 30 Amalgamated suspended the Lowell employees who had voted to abandon the strike on June 21 and returned to work on June 22 and put its vice-president O'Brien in charge of the Lowell Local as trustee. On July 2 O'Brien advised the Respondent of Amalgamated's action putting him in charge of the Lowell Local but it is not altogether clear that the notice he gave was sufficient to inform the Respondent of his and Amalgamated's position that from then on O'Brien officially represented the Lowell employees in place of one Casserly, the duly elected president of the Lowell Local. At any rate, negotiations during the rest of the summer and early fall

between the GCC and the Respondent came to nothing for the reason that the GCC insisted upon bargaining for the Respondent's employees in all its divisions whereas the Respondent asserted that its contracts were with the separate locals, that it already had a contract with the Lowell Local, and that it would not recognize the GCC as the bargaining representative for its Lowell employees.

On October 23 Amalgamated expelled Casserly, the suspended president of the Lowell Local, and thereafter on November 1 most of the members of the Lowell Local severed their connection with Amalgamated and retaining Casserly and their other old officers organized an unaffiliated union of their own which they called Transit Workers Local No. 1. This union took over and continued the Lowell Local's contract of June 25 with the Respondent, and the Respondent recognized it as the bargaining representative of its Lowell employees. Meanwhile the Lowell Local continued as an entity under the trusteeship of Amalgamated's vice-president O'Brien and an assistant, an employee named MacLean, whom some 15 or 16 of the 19 Lowell employees who continued on strike after their fellows had returned to work had appointed to represent them in subsequent dealings with the Respondent.

On the facts just summarized the Board, one member dissenting, found in the decision upon which it based the order which it asks us to enforce in its first petition, No. 5030, that in view of the integrated nature of the Respondent's operations and its long practice of bargaining with a single agent (the GCC) representing the operating and maintenance employees in all its 11 divisions, a bargaining unit consisting of its Lowell employees alone was inappropriate, that the appropriate unit was company-wide, and that the bargaining representative of a majority of the employees in that unit was Amalgamated's 11 locals acting jointly through the GCC. From this the Board said

that it followed, as alleged in the complaint, "that when the Company dealt with the Lowell Local as representing a mere fraction of this appropriate unit, at the very time when the Association [meaning in context Amalgamated's 11 locals acting together through the GCC] had the right, and in fact was insisting upon exercising it, to represent all the Company's employees, its conduct constituted a refusal to bargain with the majority representative in the appropriate unit and therefore a violation of Section 8(a)(5) of the statute." Then the Board went on to say: "Similarly, the recognition which it accorded the Lowell Local as bargaining agent in the inappropriate grouping of a minority of the employees, at a time when it was under obligation to bargain with the duly designated majority representative in the appropriate unit, was unlawful assistance to the Lowell Local and therefore a violation of Section 8(a)(2)."

The Board's finding that the Respondent unlawfully dealt with and thereby unlawfully contributed support to the Lowell Local and later to Transit Workers Local No. 1 in violation of § 8(a)(2) of the Act follows as a logical corollary from the Board's basic finding that the Respondent violated § 8(a)(5) of the Act by refusing to bargain collectively with the company-wide employee unit it found to be appropriate for that purpose. We do not understand the Respondent seriously to argue to the contrary. But before we consider the propriety of the Board's unit determination on which its finding of refusal to bargain rests, we must consider the question of GCC's compliance with § 9(f), for that is a jurisdictional requirement.

The proceedings of the Board under § 10 of the Act as a result of which the Board issued the order it asks us to enforce in its first petition, No. 5030,[2] rest basically upon

[2] The other petition, No. 5089, presents no issue of compliance.

five unfair labor practice charges, one filed by the GCC, one filed by the 11 locals, and three filed by individual employees. Complaints issued on these charges and the complaints were eventually consolidated for hearing. In the view we take of the case no useful purpose would be served by analysing the charges, complaints, answers and consolidation orders in detail. It will suffice to say that the charge filed by GCC and the complaint issued thereon alleged that the Respondent, among other unfair labor practices, refused to bargain with the GCC as the exclusive representative of the appropriate employee unit consisting of the operating and maintenance employees in all its 11 divisions, and that the Respondent in its answer to the complaint alleged in addition to denying the asserted unfair labor practices "that if said General Conference Committee is a labor organization within the meaning of § 2(5) of the Act,[3] it has not complied with the requirements imposed on labor organizations by §§ 9(f), 9(g) and 9(h) of the Act, and no complaint should have been issued pursuant to charges purportedly filed by it."

Counsel for the Respondent at the hearing before the trial examiner undertook to prove his allegation of noncompliance by the GCC by questions directed first to a former officer and later to a present member of the GCC. Counsel for the General Counsel objected in both instances and his objections were sustained by the trial examiner who ruled that GCC's compliance with § 9(f), (g) and (h) was a matter for administrative determination which was not litigable in either compliance or representation proceedings. The trial examiner added: "We must presume that the General Counsel, as an able and conscientious servant of the government, has made an administrative

[3] The Board found that the GCC was such a labor organization and that finding is not challenged by the Respondent.

determination that the General Conference Committee is in compliance with § 9(f), (g), and (h) of the Act." Respondent's counsel then made an offer to prove GCC's noncompliance. His offer was rejected, and he listed an objection to that ruling in the exceptions to the trial examiner's report which he filed with the Board. The Board did not consider this objection specifically but affirmed the trial examiner's ruling thereon in a general statement affirming all his rulings.

Certainly counsel for the Respondent preserved his client's right to have its contention considered by this court. See § 10(e) of the Act. And in *NLRB* v. *Puerto Rico Food Products Corp.*, 232 F.2d 515 (1956) this court held that when properly challenged in enforcement proceedings the Board must come forward with evidence to show compliance by the labor organization or organizations involved with the filing requirements of § 9(f), (g) and (h) of the Act[4] and give the Respondent a chance to refute that evidence if it could. This court felt then, as it does now, that there was an analogy between an administrative determination of compliance and allegations of diverse citizenship in a complaint under the diversity jurisdiction. That is to say, we were of the opinion that an administrative determination of compliance could properly be given face value, in the same way that face value is given to allegations of diverse citizenship in a diversity action. But when the administrative determination of compliance is properly challenged, then, as in the case of a challenge to the allegation of diversity of citizenship, the Board, as the party asserting jurisdiction, like the plaintiff in a diversity action, must come up with evidence to support the allegations on which it rests the jurisdiction it seeks to invoke. Thus we concluded that it was incumbent on the Board

[4] See Title 28 U.S.C. § 1733(b).

when challenged to produce evidence of the filing of the reports and affidavits which § 9(f), (g) and (h) require to be on file before the organization can invoke the enumerated procedures and remedies of the Board.

We rested our conclusion in the *Puerto Rico Food Products Corp.* case upon inferences, admittedly not altogether clear, drawn from the language used by the Supreme Court in *NLRB* v. *Coca-Cola Bottling Co. of Louisville, Inc.*, 350 U.S. 264 (1956) and upon the ground that at least as to § 9(h) the fact of compliance was so closely interwoven with the necessity for compliance that to prevent an employer from litigating the former might operate to deprive him of the power to exercise his right under *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 322 (1951) and the *Coca-Cola Bottling Co.* case, *supra*, to litigate the latter. If we were right in the *Puerto Rico Food Products Corp.* case, then it follows that the trial examiner was wrong in rejecting the Respondent's offer of proof and the Board was wrong in affirming the trial examiner's ruling.

But it now appears that counsel for the Respondent under his general offer of proof was not proposing to show that the reports required by § 9(f) and (g) had not been filed on behalf of the GCC or that its officers had not filed the non-communist affidavits required by § 9(h). His proposal instead was to show that some of the reports filed by the GCC were false. He says in his brief that "Respondent was prepared to prove that much of the material filed by the GCC pursuant to Sections 9(f)(A)(2) and (6), and 9(f)(B)(1) and (2), on which material the General Counsel based his administrative determination of compliance, was false to such an extent as to amount to a nullity in terms of complying with the Act and known to be so false by the officers of the GCC when it was filed."

This is quite another matter as we pointed out in our opinion in the *Puerto Rico Food Products Corp.* case. The

reason for this is that the statutory sanction for failing to file the documents and affidavits required by § 9(f), (g) and (h) is denial of access by the labor organization involved to the enumerated Board procedures and remedies, whereas the sanction for filing false documents and affidavits is the heavy criminal penalty imposed by Title 18 U.S.C. § 1001 quoted in the margin.[5] This sanction as to false non-communist affidavits is specifically imposed by the last sentence of § 9(h) which makes § 35A of the Criminal Code, now in pertinent part § 1001, *supra*, applicable to them. There is no reason whatever to suppose that Congress by specifically imposing a criminal sanction in § 9(h) by inference intended not to impose the criminal sanction which otherwise would be applicable in the event false reports were filed under § 9(f) and (g). And we assume from the clear imposition of a criminal sanction for filing false reports and affidavits that no other was intended. At least we are not inclined to infer the imposition of any sanction other than the criminal one in the absence of any indication to that effect in the Act.

Our conclusion, therefore, is that when challenged in a proceeding such as this the Board is called upon to support its assertion of jurisdiction by coming forward with evidence of what reports have been filed on behalf of the charging labor organization under § 9(f) and (g) and which officers of that labor organization have filed non-communist affidavits under § 9(h), and afford the challenging Respondent an opportunity to refute that evidence if it can. But we hold that a Respondent in proceedings of this sort cannot

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[5] Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

introduce evidence of the falsity of any of the reports or affidavits on file. We express no opinion on the problem that would arise in the event the Board should undertake to process a charge by a labor organization after a determination, either administrative or in a criminal prosecution, that one or more of its reports filed under § 9(f) and (g) or of the affidavits filed under § 9(h) was in fact false. See *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F.2d 36 (C.A.D.C. 1953), cert. denied 347 U.S. 943 (1954); *Farmer* v. *Int'l Fur & Leather Workers Union*, 221 F.2d 862 (C.A.D.C. 1955); and *NLRB* v. *Lannom Mfg. Co.*, 226 F.2d 194 (C.A. 6, 1955), cert. granted sub nom. *Amal. Meat Cutters & Butchers Workmen of North America, AFL–CIO* v. *NLRB*, 351 U.S. 905 (1956).[6]

It follows that while we think the trial examiner and the Board erred in rejecting the Respondent's broad offer of proof under which it might have shown failure by the GCC or its officers to file the documents required, the error later proved harmless in the light of the Respondent's assertion that what it actually wanted to prove was not any failure to file but the falsity of some of the documents submitted for filing.

Turning back now to the Board's bargaining unit determination we find no abuse by the Board of the powers conferred upon it in § 9(b) of the Act. In pertinent part that section reads: "The Board shall decide in each case wheth-

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[6] The Court of Appeals for the District of Columbia Circuit in the *Farmer* cases held that the Board had no authority to inquire as to the truth or falsity of non-communist affidavits filed by union officers and so could not deprive a union of its compliance status under § 9(h) on the ground that its president's non-communist affidavit was false. But the Court of Appeals for the Sixth Circuit in the *Lannom Mfg. Co.* case on motion dismissed a Board petition for enforcement on the ground that the charging union's president had been convicted for filing a false non-communist affidavit covering a year preceding the year in which the union's unfair labor practice charge was filed. These cases impale the Board on the horns of a dilemma. There will be time enough to consider the Board's predicament when, if ever, the occasion arises.

er, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." This general language confers broad powers upon the Board. "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). And in this case we can say as the Supreme Court said in the above case, "While we do not say that a determination of a unit representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, our power is at an end." The fact that the Respondent's operations are of the same nature in all its divisions, and its and its predecessors' practice for nearly a half a century of dealing with its employees on a system-wide basis, are clearly sufficient to support the Board's determination that only a company-wide unit was appropriate for the purposes of collective bargaining between the Respondent and its employees.

Respondent argues further, however, that even if the Board's company-wide unit determination is proper, no violation of § 8(a)(5) can be based thereon for at the time of the supposed violation Respondent believed in good faith that the smaller unit was appropriate. The short answer to this is that we find no basis for setting aside the finding of the trial examiner adopted by the Board that the Respondent entertained no such bona fide belief.

From this determination of violation of § 8(a)(5), as we pointed out earlier in this opinion, follows the conclusion that the Respondent by recognizing and dealing separately with the Lowell Local and Transit Workers Local

No. 1 gave those unions support in violation of § 8(a)(2) of the Act. Moreover, additional support for this latter conclusion is found in the Respondent's dealings with the employees allegedly discriminatorily discharged as will presently appear.

The Board found that after the strike the Respondent discriminated against several of its employees for their adherence to Amalgamated, its local unions and the GCC. The two petitions cover the cases of eight men, one an employee in the Haverhill Division and the other seven members of the Lowell Local who had not returned to work when a majority of the members of that local abandoned the strike on June 22, 1952. The Board found that the Haverhill employee and two of the Lowell employees were discharged solely for their activities on behalf of Amalgamated and GCC. It ordered these men reinstated to their former or equivalent positions with back pay and without loss of seniority. The Board found that the other five, one of whom was O'Brien's assistant, MacLean, mentioned above, while ostensibly discharged for cause, in fact were discriminatorily discharged for their union activity. The general pattern of discrimination found by the Board in all these five cases was the same. It was to impose the penalty of "indefinite suspension" on the men for relatively minor infractions of company rules and then to require them to process their grievances, not through Amalgamated's vice-president O'Brien as trustee in charge of the Lowell Local, but through Casserly, at first as the suspended president of that local and later as the president of Transit Workers Local No. 1, with whom they were known to be out of sympathy, if not at swords points, and unwilling to deal. The Board found that by this tactic the Respondent not only discriminated against the men illegally in violation of § 8(a)(3) by imposing a heavier penalty for their derelictions, in practical effect discharge, than would otherwise have been meted out, but also in the process gave illegal

support to the Lowell Local and Transit Workers Local No. 1 in violation of § 8(a)(2) of the Act.

The Board found that on the basis of the eventual punishments inflicted after pursuit of grievance procedures upon other employees for comparable offenses the maximum punishment these five men would have received for their violations of company rules, had they followed the grievance procedures insisted upon by the Respondent, would not have exceeded ten days suspension from work. It found, therefore, that had these men set the grievance procedures required by the Respondent in motion, their "indefinite suspensions" would have been reduced to ten days. Finding also that the Respondent's requirement that grievances be processed through Casserly and his locals was discriminatory as to these men as well as an unfair labor practice in itself under § 8(a)(2), the Board concluded that only the Respondent's discriminatory conduct kept the men's suspensions from being reduced to the usual level of company punishments for offenses such as theirs. It therefore ordered these men reinstated on the usual terms but less ten days back pay.

Little or no purpose would be served by analysing each man's case in detail. It will be enough to say that although in one instance the case is close, we are satisfied from a study of the record that in every instance the Board's findings of fact and inferences therefrom are supported by substantial evidence. The serious question on this phase of the case is whether the Board had authority under the Act to order reinstatement of the five men the Board found to deserve suspensions for ten days for infractions of company rules but not "indefinite suspensions," that is to say, in effect, discharge.

The Respondent contends that in ordering the five men reinstated with any pay at all the Board flouted the clear mandate of the sentence in § 10(c) of the Act which reads: "No order of the Board shall require the reinstatement of

any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

The purpose of this provision is to make it abundantly clear that the Board is not to interfere with the exercise by employers of their traditional right to discharge employees for adequate cause. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). Thus reinstatement has been denied to employees discharged for rank insubordination, wilful disobedience or disloyalty, such for instance as disparaging their employer's services to the public at a critical time in the development of the business, *NLRB* v. *Electrical Workers*, 346 U.S. 464 (1953) or, no doubt, beating a plant manager, cf. *NLRB* v. *Efco Mfg., Inc.*, 227 F.2d 675 (C.A. 1, 1955), and this even though the employee's offense was committed in connection with a protected activity. But the provision is not to be construed to provide a cloak protecting an employer when he uses his right to discharge for the purpose of intimidating or coercing his employees in the exercise of their rights under the Act. And this occurs when an employer discharges an employee for a minor offense ordinarily punished by not more than a few days suspension where the Board finds on adequate evidence that the excess punishment was really for engaging in a protected activity. That is this case, for the Board found that breaking company rules was merely a pretext, not the cause, for discharging the men. It found on evidence we consider wholly adequate that because these five men had not processed their grievances through the union the Respondent was unlawfully assisting and with which the men would not and perhaps for personal reasons could not, deal, it discriminatorily failed to reduce the punishments inflicted upon them for breaking company rules. Thus the Board concluded, we believe correctly, that the total punishment inflicted on the men was not for their infractions of company rules but for their insistence upon their pro-

tected right to process their grievances through their proper collective bargaining agent, Amalgamated and its duly constituted locals acting through the GCC, and no other. The remedy afforded is certainly appropriate for the offense.

Only the procedural question remains for consideration.

The basic substantive questions we have so far considered are all presented by the first petition. The second petition presents nothing new of that nature. It presents only the question of the discriminatory discharges of two of the men whose cases we have already considered, because both of them were discharged under the same circumstances as the men covered in the first petition. The second petition is definitely a sequel or mere appendage of the first.

When the cases of the men with whom we are concerned in the second petition came on for hearing before a trial examiner the hearing in the first case had been completed and the trial examiner had filed his intermediate report but the Board had not yet handed down its decision and order. In this situation counsel for the General Counsel asked for a continuance until the Board had decided the first case in order to avoid the necessity of retrying on the same evidence the basic issues of unit determination, union support and employer discrimination common to both which had taken weeks to try. The trial examiner granted the motion after determining that the parties would neither enter into a stipulation as to the parts of the record in the first case which were relevant, nor agree to include the entire record in the first case as part of the record in the case then on trial. Thus the trial examiner had to choose between relitigating matters already tried but not yet decided or continue awaiting decision. Certainly in this situation it cannot be said that he abused his discretionary powers in granting the continuance.

Decrees will be entered enforcing the orders of the Board.

Appendix B

Title 29 U.S.C. Section 159

Representatives and elections—(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such

purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate

such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Secret ballot; limitation of elections

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Filing by union of its constitution, by-laws, and report; contents of report

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under

subsection (b), of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) of this subsection were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans,

and (1) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) of this subdivision to be filed with the Secretary of Labor.

Annual reports by union; contents

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B) of this section. No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

Affidavits showing union's officers free from Communist Party affiliation or belief

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under sub-

section (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate of constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

TITLE 29 U.S.C. SECTION 160

Prevention of unfair labor practices—(a) Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prepent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provi-

sion of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence inapplicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of

civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Reduction of testimony to writing: findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair

labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Modification of findings or orders prior to filing record in court

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any United States district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such

person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and

shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28.

Review of final order of Board on petition in court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial

evidence on the record considered as a whole shall in like manner be conclusive.

Institution of court proceedings as stay of Board's order

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

Jurisdiction of courts unaffected by limitations prescribed in sections 101-110 and 113-115 of this title

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101-110 and 113-115 of this title.

Expeditious hearings on petitions

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

Injunctions

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have juris-

diction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Hearings on jurisdictional strikes

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

(1) Whenever it is charged that any persons has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board

with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 472

EASTERN MASSACHUSETTS STREET RAILWAY COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The court below handed down a single opinion (Pet. App. A, 14–29) in two cases involving National Labor Relations Board orders against petitioner. The court's opinion is reported at 235 F. 2d 700. The two decisions and orders of the Board which are here involved are reported at 110 N. L. R. B. 1963 and 113 N. L. R. B. 298, respectively (B. A. I 62a–248a, 315a–342a; B. A. II 2a–40a).[1]

[1] Record references designated "B. A. I" and "B. A. II" are to the pages of the Board's Appendices to its briefs in Cases No. 5030 and No. 5089, respectively, in the court below. Since the subsidiary findings of fact are not in dispute, these record

JURISDICTION

The judgment of the court below (Pet. App. A) was entered on July 31, 1956. The petition for a writ of certiorari was filed on October 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, at a hearing on unfair labor practices charged by a labor organization, may decline to permit litigation of the truth or falsity of data which that labor organization has filed with the Secretary of Labor pursuant to Section 9 (f) (A) (2) and (6) and 9 (f) (B) (1) of the National Labor Relations Act and has furnished to its members pursuant to section 9 (f) (B) (2) of the Act.

2. The Board found, upon substantial evidence, that petitioner discriminated in violation of Section 8 (a) (3) of the Act against certain employees who had broken company rules by refusing to reduce the disciplinary penalty of indefinite suspension or discharge to a suspension of not more than 10 days solely because the employees failed to process grievances through a union which petitioner was unlawfully recognizing and supporting rather than through the employees' lawful bargaining representative. The second question presented is whether the Board was precluded under Section 10 (c) of the Act from requiring the petitioner to reinstate these employees

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references are, for the most part, solely to the findings set forth in the Board's decisions, including the findings of the trial examiners.

and make them whole for any loss of pay suffered by reason of the discrimination against them.

3. Where the unfair labor practices alleged in a second case against petitioner involved the same evidence and issues as the unfair labor practices found by a trial examiner in a prior case against the petitioner, which was then pending before the Board for decision, whether the trial examiner in the second case, in order to avoid relitigating issues already tried, abused his discretion in continuing the hearing in the second case until such time as the Board might decide the first case.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*) are set forth in Appendix B of the petition (Pet. App. 30–44).

STATEMENT

In the court below, the National Labor Relations Board sought enforcement of orders in two separate but related unfair labor practice cases against petitioner (No. 5030 and No. 5089 on the docket of that court). In the first case the Board found that petitioner had violated Section 8 (a) (1), (2), (3), (4) and (5) of the Act and in the second case that it had violated Section 8 (a) (1) and (3) of the Act. Petitioner asserted a number of defenses to the Board's petitions for enforcement. It contended, so far as is here pertinent, that the Board at the hearing in the first case upon a complaint issued pursuant to a charge filed by the General Conference Committee, a

labor organization, hereinafter referred to as "GCC,"[2] had improperly refused to permit petitioner to introduce evidence with respect to the truth or falsity of data filed with the Secretary of Labor and furnished to members of the GCC in purported compliance with Section 9 (f) (A) (2) and (6) and Section 9 (f) (B) (1) and (2) of the Act. It contended also that the Board's order in both the first and second case was invalid under Section 10 (c) of the Act insofar as it required petitioner to offer reinstatement and back pay to five employees whose disciplinary suspensions in excess of 10 days were penalties imposed by petitioner for the failure of these employees to process grievances through a union which petitioner was unlawfully recognizing and supporting. Finally, it contended that the trial examiner in the second case had abused his discretion and denied petitioner due process of law by continuing the hearing in the second case until such time as the Board might decide the related and dependent issues in the first case, which was then pending before the Board. We state below the facts necessary to an understanding of these three issues which petitioner is now asking this Court to review.

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[2] The GCC, or General Conference Committee, is composed of the president of each of 11 locals of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL, and 1 delegate elected by petitioner's maintenance employees (B. A. I 71a, 80a–82a). The 11 locals, acting jointly through the GCC, served as bargaining representative of petitioner's employees in a company-wide bargaining unit (B. A. I 317a–318a).

I. PROCEEDINGS BEFORE THE BOARD

The compliance issue. Pursuant to an unfair labor practice charge filed by the GCC in the first case, the General Counsel of the Board issued a complaint against petitioner (B. A. I 6a–9a, 42a–47a). In answer to the complaint, petitioner alleged that the GCC had not complied with the requirements imposed upon labor organizations by Section 9 (f), (g) and (h) of the Act and that the complaint had therefore been improperly issued (B. A. I 24a). That part of Section 9 (f) here involved prohibits the Board from issuing a complaint pursuant to a charge filed by a labor organization unless that labor organization (1) has filed with the Secretary of Labor copies of its constitution and bylaws and certain operational reports pertaining to the name, titles and compensation of its officers and to specified union procedures, and (2) can also show that it has filed with the Secretary of Labor and furnished to its members certain financial reports in a form prescribed by the Secretary of Labor.

At the hearing petitioner sought, by questions addressed first to a former officer and later to a present member of the GCC, to establish that the GCC had not fully complied with the requirements of Section 9 (f) of the statute (B. A. I 431a–433a, 437a–438a, 589a–591a). Subsequently, in clarification of what it was seeking to prove, petitioner stated in its brief to the court below that it "was prepared to prove that much of the material filed by the GCC pursuant to Sections 9 (f) (A) (2) and (6), and 9 (f) (B) (1) and (2),

on which material the General Counsel based his administrative determination of compliance, was false to such an extent as to amount to a nullity in terms of complying with the Act and known to be so false by the officers of the GCC when it was filed" (Pet. App. A 22). Counsel for the General Counsel objected to petitioner's interrogation of the witnesses on this subject and his objections were sustained by the trial examiner on the ground that the issues as to compliance which petitioner had raised were matters for administrative determination and were not litigable in unfair labor practice proceedings (B. A. I 432a, 590a–591a). The Board affirmed the examiner's ruling (B. A. I 315a–316a).

The Board's order. That part of the Board's order to which petitioner specifically objects relates to four of the employees involved in the first case and one of those involved in the second case who had been indefinitely suspended or discharged by petitioner following their infraction of company rules (B. A. I 321a–322a, B. A. II 2a). The Board found that disciplinary action was taken against them because of their infraction of these rules and not for discriminatory reasons (B. A. I 322a–323a; B. A. II 2a). It found, however, that in the case of indefinite suspensions or discharges for no more serious infractions of operational rules than those here involved, the normal experience was for the individual employee to process a grievance through the recognized bargaining representative, with the almost invariable result that the penalty of indefinite suspension or discharge was

reduced to a suspension seldom exceeding 10 days (B. A. I 323a, B. A. II 3a). Petitioner made it clear that the five employees here involved could have the disciplinary penalties against them reduced only if they utilized the services of a labor organization called the Lowell Local, which petitioner was then unlawfully recognizing and assisting, in processing their grievances (B. A. I 323a–324a, B. A. II 3a). Because the assisted Lowell Local was unwilling to accept their grievances or because they were unwilling to process a grievance other than through the GCC, their lawful bargaining representative, their grievances were never processed and they were never reinstated (B. A. I 324a, B. A. II 3a–4a).

The Board concluded that petitioner's adamant refusal to deal with the GCC, the lawful bargaining representative of these employees, and its unlawful insistence upon dealing solely with the Lowell Local, resulted in discrimination in the tenure of employment of these five employees which would otherwise not have been visited upon them and that petitioner thereby violated Section 8 (a) (3) and (1) of the Act (B. A. I 325a, B. A. II 3a–4a). To remedy this unlawful discrimination, the Board's order required petitioner to offer reinstatement to each of the five employees and make him whole for any loss of pay suffered by reason of the discrimination against him (B. A. I 330a–331a, B. A. II 5a).

The continuance of the hearing in the second case. When the second case against petitioner came on for hearing on October 8, 1954, the trial examiner in the

first case had issued his intermediate report but the Board had not yet handed down its decision. Counsel for the General Counsel asked for a continuance of the second case until such time as the Board should issue its decision in the first case in order to avoid the necessity of retrying on the same evidence the same basic issues common to both cases. The trial examiner granted the motion after first ascertaining that the parties were unable to agree upon a stipulation as to what evidence in the first case was relevant to the issues in the second case and that they were unwilling to agree to include the entire record in the first case as a part of the record in the second case (B. A. II 12a–14a). After the Board in the first case had issued its decision and order, the hearing in the instant case, upon agreement of the parties, was resumed on February 9, 1955 (B. A. II 14a). The Board affirmed the trial examiner's ruling (B. A. II 2a).

II. THE DECISION OF THE COURT BELOW

The court below enforced the Board's orders in full. With respect to the compliance issue, it held that petitioner was not entitled to introduce evidence of the truth or falsity of the reports which unions must file with the Secretary of Labor and furnish to their members pursuant to Section 9 (f) and (g) of the Act. It rejected, as without merit, petitioner's contention that, since the five employees in question were suspended for cause, Section 10 (c) of the Act precluded the Board from ordering petitioner to rein-

state and make whole the five employees whose suspensions in excess of 10 days were found to be discriminatory. It held that Section 10 (c) "is not to be construed to provide a cloak protecting an employer when he uses his right to discharge for the purpose of intimidating or coercing his employees in the exercise of their rights under the Act" as petitioner did here when "it discriminatorily failed to reduce the punishments inflicted upon them for breaking company rules" (Pet. App. A 28–29).

The court below likewise found no merit in petitioner's contention that the trial examiner in the second case, when faced with a choice between relitigating matters already tried but not decided in the first case or granting a continuance of the hearing until the first case should be decided, abused his discretion in adopting the latter course.

ARGUMENT

1. The ruling of the court below that issues as to the truth or falsity of reports which unions must file with the Secretary of Labor and furnish its members pursuant to Sections 9 (f) (A) (2) and (6) and 9 (f) (B) (1) and (2) of the Act are not litigable in unfair practice proceedings before the Board is correct. Section 9 (f) provides for the filing of detailed organizational and financial reports by labor organizations with the Secretary of Labor, not with the Board, and for the furnishing of the financial reports to the union members. Copies of these reports are not furnished the Board. Instead, it receives only a copy of the notice sent by the Department of Labor to the

labor organization, stating that the latter has complied with the filing requirements of Section 9 (f), and a written declaration from the labor organization that it has furnished to all its members copies of the financial report filed with the Secretary of Labor. See N. L. R. B. Rules and Regulations, Series 6, as amended, Section 102.13 (a). Litigation before the National Labor Relations Board of the truth or falsity of statements filed with the Secretary of Labor could at most lead to a difference of view between the Board and the Secretary of Labor over something which by statute has been placed in the province of the Secretary of Labor.

The legislative history of Section 9 (f) shows that Congress did not intend that the data filed with the Secretary of Labor should be made public.[3] Pursuant to this legislative intent, the Department of Labor has issued a General Regulation stating that none of the information thus furnished it shall be made public or disclosed to anyone outside the Department of Labor except, upon written request, to (1) members of the union, (2) the National Labor Relations Board and courts having jurisdiction over proceedings under the Act, or (3) members of Congress acting through

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[3] 93 Cong. Rec. 3839 and 4284 (Legislative History of the Labor Management Relations Act, 1947, pp. 1014 and 1150); *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 924 (C. A. 6), cert. den. 342 U. S. 859.

appropriate committees.[4] Litigation of the truth or falsity of this data in unfair labor practice proceedings would thus also frustrate the legislative intent that such matters not be made public.

The conclusion reached by the court below on this issue is in accord with the decisions of all other courts of appeals which have had occasion to express themselves on the matter.[5] It is not, as petitioner asserts, in conflict with *National Labor Relations Board* v. *Lannom Manufacturing Co.*, 226 F. 2d 194 (C. A. 6), certiorari granted, *sub nom. Amalgamated Meat Cutters & Butcher Workmen of North America* v. *National Labor Relations Board*, 351 U. S. 905 (No. 40, this Term). There the falsity of an affidavit filed by one of the union officers pursuant to Section 9 (h) of the Act had been established in criminal proceedings under Section 35A of the Criminal Code; the court expressly adhered to its previously stated view that factual issues as to compliance may not be litigated in unfair labor practice proceedings, but concluded that where the falsity of the affidavit had been established in criminal proceedings, "there is * * * no reason why [the] Court can not, as a matter of law, give to that conviction the proper legal effect which should follow from it." 226 F. 2d at 197. The court below,

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[4] General Regulations of the Office of the Secretary of Labor, 29 CFR, Labor, Subtitle A, Part 2, Sec. 2.4 (1949 and 1952).

[5] *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6); *National Labor Relations Board* v. *Louisville Container Corp.*, 209 F. 2d 654 (C. A. 6); *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873.

taking note of the *Lannom* decision, specifically stated that it was expressing "no opinion on the problem that would arise in the event the Board should undertake to process a charge by a labor organization after a determination, either administrative or in a criminal prosecution, that one or more of its reports filed under Section 9 (f) and (g) or of the affidavits filed under Section 9 (h) was in fact false" (Pet. App. A 24).

2. Petitioner's contention that the Board was precluded by Section 10 (c) of the Act from requiring petitioner to reinstate and make whole the five employees upon whom petitioner had imposed a discriminatorily heavy penalty for infraction of company rules, likewise presents no question warranting review by this Court. That part of Section 10 (c) of the Act which provides that no order of the Board shall require reinstatement of or back pay to any employee if he has been suspended or discharged for cause has no application here, for the Board found, upon substantial evidence, that the suspension of these five employees beyond a 10-day period was discriminatory and not for cause (*supra*, pp. 6–7). The decision of the court below that the purpose of this provision of Section 10 (c) "is to make it abundantly clear that the Board is not to interfere with the exercise by employers of their traditional right to discharge employees for adequate cause," not "to provide a cloak protecting an employer when [, as here,] he uses his right to discharge for the purpose of intimidating or coercing his employees in the exercise of

their rights under the Act," is in accord with the decisions of other courts interpreting this provision. *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660, 662 (C. A. 2); *National Labor Relations Board* v. *Dixie Shirt Co.,* 176 F. 2d 969, 974 (C. A. 4). There are no decisions to the contrary.

3. Likewise without substance is petitioner's final contention that it was denied due process by the action of the trial examiner in continuing the hearing in the second case until such time as the Board might decide the dependent and related issues in the first case. Since, as the court below stated, the trial examiner had to choose between relitigating matters already tried but not yet decided and awaiting the decision of the Board in the first case, it certainly "cannot be said that he abused his discretionary powers in granting the continuance" (Pet. App. A 29). It is well settled that "the matter of continuance rests in the sound discretion of the trial [examiner] and [his] action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial [examiner] in such a case a denial of due process of law." *Franklin* v. *South Carolina,* 218 U. S. 161, 168; *National Labor Relations Board* v. *Michalik,* 201 F. 2d 48, 49 (C. A. 6); *National Labor Relations Board* v. *A. J. Siris Products Corp.,* 186 F. 2d 502, 503 (C. A. 4). No such case is presented by the examiner's ruling here.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

FANNIE M. BOYLS,
Attorney, National Labor Relations Board.

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